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May 6, 1994

Mr. Timothy Fain
Office of Management and Budget
Room 3225
New Executive Office Building
725 17th Street, N.W.
Washington, D.C. 20503

Via Messenger

Attention: Mr. Bruce McConnell
(via telecopy 395-7245)

RE: Federal Communications Commission
Implementation of Section 309(j) of the
Communications Act -- Competitive Bidding
Paperwork Reduction Act Submission (SF 83)
dated April 28, 1994

Dear Mr. Fain:

I am writing on behalf of the Association of Independent Designated Entities ("AIDE") to oppose portions of the Paperwork Reduction Act submission (SF 83 dated April 28, 1994) of the Federal Communications Commission ("FCC") with respect to the FCC's proposed implementation of Section 309(j) of the Communications Act of 1934, as amended. Section 309(j) permits the FCC to use competitive bidding (i.e., auctions) to select licensees for certain classes of radio-station licenses.

**AIDE Represents "Designated Entities" Receiving
Explicit Statutory Protection Under Section 309(j).**

In adopting Section 309(j) of the Communications Act, Congress specified that an objective of competitive bidding was to:

Promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies,

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and businesses owned by members of minority groups and women....^{2/}

To implement this goal, Congress required the FCC, in its implementation of competitive bidding regulations, to:

Ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and for such purposes, consider the use of tax certificates, bidding preferences, and other procedures....^{2/}

AIDE is an unincorporated association, with membership limited to persons and entities classified as "Designated Entities" under Section 309(j) of the Communications Act. Various AIDE members have extensive legal, technical, financial, and communications backgrounds. Many have owned or managed small businesses, and understand the special needs and problems of small and start-up businesses. The women and minority AIDE members also know the unique burdens which they bear. Accordingly, AIDE has a special expertise to comment upon the FCC's auction rules from the perspective of the various Designated Entities.

**Emergency OMB Review of the FCC's Request
Is Unwarranted and Could Produce Poor Decisionmaking.**

As a threshold matter, AIDE opposes the FCC's request for emergency clearance of its Paperwork Reduction Act approval. Although the FCC attempts to portray OMB approval as the last roadblock to its holding auctions, the facts are otherwise.

Specifically, the FCC has adopted auction rules for only two of the radio services (Narrowband Personal Communications Service (NB/PCS) and Interactive Video and Data Service ("IVDS")) for which it has competitive bidding authority, and those rules have not yet been finalized, released, or submitted for OMB approval. Following their release, they will be subject to a statutory 30-day period for reconsideration or appeal. Historically, the initial set of Petitions for Reconsideration of any major FCC rulemaking decision reveals at least one substantial problem which the FCC must address in a reconsideration decision.

^{2/} Section 309(j) (3) (B).

^{2/} Section 309(j) (4) (D).

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At this point, the FCC has not adopted any additional auction rules for any other service, including both Broadband PCS ("BB/PCS") and unserved-area cellular. (BB/PCS is the "big-ticket" service upon which most of the FY 1994 revenue projections are based; when the BB/PCS rules are delayed, so are the BB/PCS auctions.) Nor has the FCC adopted any application processing rules for PCS. As with NB/PCS, each of those sets of complex rules requires finalization and public distribution, and each will be subject to reconsideration, appeal, and OMB approval under the Paperwork Reduction Act.

Finally, even if all the rules were adopted, released, approved, and free from substantial problems requiring reconsideration, the FCC still could not hold auctions. It doesn't have an auctioneer! Except for NB/PCS (which has a limited-revenue exception to permit Section 8(a) contracting), a full government procurement cycle is required to contract for auctioneer services, and the FCC's contracting notice has not yet been finalized or published in the Commerce Business Daily.

In short, the FCC's request for emergency clearance appears to be motivated not by a need for expedition, but rather as an attempt to evade OMB's normal 60-day clearance process for an extremely complex set of issues.^{2/} For example, the FCC's Ralph Haller, Chief of the FCC's PCS/Auction Task Force (and signatory of the FCC's Request at issue here), publicly describes the FCC's proposed auctions as "the most complex auctions ever to be held." The FCC cites the great level of public comment which it received on the auction proposal as somehow justifying expedited review. To the contrary, the level of public comment indicates that the issues are complex and controversial, and even more worthy than usual of an independent OMB approval.

**The FCC's Proposal to Require Designated Entities
to Make Pre-Bid "Upfront Payments" and Post-Bid Down
Payments Is Contrary to Section 309(j).**

As described by the FCC, a winning bidder will make its payments in three stages. First, all bidders (including Designated

^{2/} Indeed, the FCC appeared to limit public comment on its proposal within the expedited review period by filing its request with OMB on Thursday, April 28, but waiting until Monday, May 2, to issue public notice of its filing. Further, the FCC's copy contractor (its designated source for public distribution of the request) did not respond to our order for the request (made on the morning of May 3) until Thursday, May 5.

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nated Entities) will make an "upfront payment" equal to \$0.02 per pop per MHz (with no maximum payment but not less than \$2,500) in order to qualify to bid in an auction; the winner's upfront payment will be applied against its down payment and the losers' upfront payments refunded or reapplied.^{1/} Second, the winning bidder will make a 20% down payment on its winning bid, less the amount of its up-front payments.^{2/} Third, following the grant of the winning bidder's application, the winning bidder will pay the remaining 80% of the bid.^{3/}

In the case of Designated Entities, the FCC proposes to reduce the down payment to 10% and allow payment of the remaining 90% of the bid in installments over the license term, with interest at the rate for U.S. Treasury obligations of maturity equal to the license term.^{4/} However, the FCC proposes to "only allow installment payments for licenses in those smaller spectrum blocks that are most likely to match the business objectives of bona fide small businesses."^{5/} While the FCC also proposes to establish incremental bidding credits and/or set aside some spectrum for Designated Entities in some radio services, the FCC's bid-payment system for Designated Entities cannot be reconciled with the legislative intent or terms of Section 309(j).

In this context, OMB should note that the Designated Entities became "designated" in large part because they are substantially under-represented as FCC licensees. One of the principal causes of that under-representation is their lack of access to capital. Thus, the FCC's proposal to require substantial "upfront payments" to qualify as a bidder effectively prevents Designated Entities from bidding, and thus perpetuates the harms which Congress sought to correct.

^{1/} See FCC's untitled description of the competitive bidding process (attached to its SF 83) ("Description"), ¶¶26-30.

^{2/} Description, ¶30.

^{3/} Description, ¶12.

^{4/} Description, ¶¶43-44. AIDE would assume that the interest rate would be fixed as of the date of licensing, as would that of a Treasury obligation itself, rather than float with changes in interest rates. Designated Entities need the certainty of a fixed interest payment.

^{5/} Description, ¶43.

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For example, under the FCC's proposals a Designated Entity seeking to bid on a 20 MHz BB/PCS license -- for which it could have a preference -- would be required to make an \$8 million up-front payment to make a bid which, if successful, could be paid on the installment plan.²¹ However, the FCC defines a "small business" (the principal class of Designated Entities) as having a net worth not exceeding \$6 million and an average after-tax net income of \$2 million.²² It will be extremely difficult and costly, if not simply impossible, for a \$6 million company to make an \$8 million up-front payment. Lawfully, the FCC cannot require a Designated Entity to make more than a nominal up-front payment in order to become an eligible bidder.

The FCC's proposal that it be permitted to decide which auctions it will permit Designated Entities to make installment payments is equally troublesome. If this proposal had been effective in the late 1960's when then-infant MCI was getting its first microwave licenses, the FCC could have easily (and unknowingly) killed off what has become a driving force in telecommunications. Giving the FCC the authority to tilt the auction process for (or against) Designated Entities will politicize auction rulemakings, represent poor public policy, and violate Section 309(j).

The FCC's proposed system of up-front payments also appears to be colored by its expectations for substantial revenue for PCS licensing. In many cases, such as common-carrier paging, and perhaps SMRs and PCPs, the winning bid is likely to be less than the required up-front payment. For all entities, the FCC should accept any level of up-front payment (assuming that up-front payments are in fact required), provided that the payment is the lesser of 20% of the bidder's highest bid or the amount otherwise required by the FCC. No deposit should be required for bids of less than some nominal amount, say \$10,000.

Finally, AIDE questions the FCC's statutory authority to require any up-front payments at all.²³ The FCC's justifica-

²¹ This proposal can only call to mind the oft-quoted maxim that "Both the rich and the poor have the opportunity to sleep under bridges."

²² Description, ¶42.

²³ AIDE also opposes as draconian the FCC's proposal to keep the entire 10% or 20% down payment if the highest bidder's
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¹⁸ Description, ¶42.

¹⁹ AIDE also opposes as draconian the FCC's proposal to keep the entire 10% or 20% down payment if the highest bidder' (continued).

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tion for such a payment appears in part to be premised on revenue maximization, (as discussed below) a prohibited concern. Further, the FCC's concern that the auction will terminate with the winning bidder unable to pay can be resolved by keeping the auction open until the granted license is final and unappealable.

**The FCC's Proposals On Auction Design and
On Winning-Bidder Penalties Violate the Statutory
Prohibition Against Consideration of Revenue Maximization.**

The FCC may not consider the amount of auction revenue as a substantial factor in this rulemaking. Section 309(j) carefully proscribes the FCC's consideration of auction revenues:

(7) Consideration of revenues in public interest determinations.-

(A) Consideration prohibited.-In making a decision pursuant to Section 303(c) to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited.-In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of federal revenues from the use of a system of competitive bidding under this subsection.

W (...continued)

application is later dismissed as defective. In many cases, a change in the applicable law or other intervening circumstances (some as trivial as an error in application preparation) can cause an application to be dismissed without applicant misconduct. Where misconduct occurs, the dismissal itself is a sufficient penalty. In egregious cases, the FCC can invoke its forfeiture authority against the violative applicant. Small businesses simply cannot afford the automatic financial penalties which the FCC proposes.

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(Emphasis added.) Thus, the FCC must base its decisions in this proceeding upon traditional public interest factors and the specific statutory objectives of competitive bidding, and not revenue maximization.

AIDE is troubled by the repeated theme running through the FCC's proposal, suggesting that it sought to adopt rules which raise the greatest amount of revenues.^{11/} For example, the FCC proposes that:

[I]f a high bid is withdrawn prior to the close of a simultaneous multiple round auction, the Commission will impose a penalty equal to the difference between the withdrawn bid and the amount of the winning bid.... If a winning bidder defaults after the close of such an auction, the defaulting bidder will be required to pay the foregoing penalty plus ... three percent of the amount of the winning bid....^{12/}

This rule appears unnecessary, except for revenue maximization. If the winning bidder defaults, the license remains for re-licensing; the FCC has not lost a revenue source.

Similarly, by adopting so-called "activity rules", the FCC proposes to require bidders to participate in all rounds of bidding for certain licenses.^{13/} Why should the FCC care whether bidders participate in the entire auction, or only at the end when they might be the highest bidder?

The FCC's Proposal to Preclude Settlements Between Potential Bidders Is Inconsistent With Section 309(j).

The FCC has a well-established policy favoring settlements between applicants filing mutually exclusive applications. In the cellular context, this policy developed with the FCC's acceptance of full-market wireline settlements in the Chicago and

^{11/} In addition to the textual discussion here, two other examples of prohibited revenue maximization are discussed in this letter. On pages 4-5, we discuss the FCC's proposal to require pre-bidding upfront payments without any maximum payment specified. On pages 7-11, we discuss the FCC's refusal to accept settlements between potential bidders.

^{12/} Description, ¶¶16, 32-34.

^{13/} Description, ¶¶13-15.

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Los Angeles MSAs in 1983.^{11/} At that time, Commissioner Fogarty best articulated the FCC's settlement policies:

[T]his Commission has now twice determined that settlements by mutually exclusive cellular radio applicants are in the public interest, convenience and necessity and will be approved by the FCC.... We have been faithful to this paramount regulatory responsibility in encouraging cellular applicant settlements, and this particular settlement agreement -- and those settlements which I hope will follow on both the wireline and nonwireline sides of the split-frequency cellular allocation -- enjoy the full measure of the Commission's approval.^{14/}

In applying the lottery process to cellular applications, the FCC explicitly retained its policy favoring full-market settlements.^{12/} The FCC consistently has followed a similar policy permitting, if not encouraging, settlements with respect to all other radio services.

Thus, at the time Congress was considering the amendments to the Communications Act which were ultimately adopted as part of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), the FCC had a well-established settlement policy.

^{11/} Advanced Mobile Phone Service, Inc., 91 FCC 2d 512 (1983) (Chicago); Advanced Mobile Phone Service, Inc., 93 FCC 2d 683 (1983) (Los Angeles).

^{14/} Los Angeles, *supra* (Fogarty, Separate Statement).

^{12/} Cellular Lottery Rule Making, 101 FCC 2d 577, 582 (1984), modified, 59 RR 2d 407 (1985), aff'd in relevant part, Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987). Accord, Fresno Cellular Telephone Company, 1985 LEXIS 2427, *12 ("Our policy of encouraging settlements has enabled us to expedite the processing of cellular applications and thus to bring cellular service to the public with a minimum of delay."), aff'd, Maxcell Telecom Plus, *supra*; Telelocator Network of America, 58 RR 2d 1443 (1985) (tax certificates issued to further the FCC's policy favoring full-market settlements); First Report and Order and Memorandum Opinion and Order On Reconsideration, 6 FCC Rcd 6185, 6221 (1991), reconsidered in part, 7 FCC Rcd 7183 (1992) (cellular unserved areas).

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Congress explicitly affirmed the FCC's settlement policy. Specifically, amended Section 309(j)(6) of the Communications Act contains the following "Rules of Construction":

(6) Rules of Construction.- Nothing in this subsection [309(j)], or in the use of competitive bidding, shall-

(A) Alter spectrum allocation criteria and procedures established by the other provisions of this Act;

* * *

(E) Be construed to relieve the Commission of the obligation in the public interest to continue to use ... negotiation ... and other means in order to avoid mutual exclusivity in application and licensing proceedings....

The Conference Report accompanying the Budget Act explained that Section 309(j)(6):

[S]tipulates that nothing in the use of competitive bidding for the award of licenses shall limit or otherwise affect the requirements of the Communications Act that limit the rights of licensees, or require the Commission to adhere to other requirements.^{11/}

These two provisions in Section 309(j)(6) clearly indicate that Congress intended the FCC to carry forward its existing settlement policies.^{11/} The mandated "use [of] negotiation ... and

^{11/} Conference Report to the Budget Act, H.R. Rep. 103-213, 103rd Cong. 1st Sess, 103 Cong. Rec. H5792, H5915 (August 4, 1993) (provision of House bill adopted in final Budget Act) ("Conference Report").

^{11/} Section 309(j)(1) states that, "If mutually exclusive applications are accepted for filing ..., then the Commission shall have the authority ... the grant such license ... through the use of system of competitive bidding that meets the requirements of this subsection." (Emphasis added.) Tellingly, Section 309(j)(1) does not require that the FCC must use competitive bidding, but only that it has the authority to do so in appropriate cases. That language, together with the incorporation of Sections 309(j)(6)(A)&(E) and 309(j)(7)(B) ("the requirements of this subsection") clearly indicates the legislative intent to
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other means in order to avoid mutual exclusivity in application and licensing proceedings" can only mean that settlements (which are the product of negotiation and which avoids mutual exclusivity) are to be permitted under competitive bidding.

The FCC's proposal here is contrary to those statutory requirements. Specifically, the FCC proposes that auction applicants "will not be permitted to make any major modifications to their applications, including ownership changes or changes in the identification of parties to bidding consortia."^{19/} Similarly, the FCC states that the post-auction long-form application:

must include ... a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement they have entered into relating to the competitive bidding process prior to the close of bidding. All such arrangements must be entered into prior to the filing of the short-form application.^{20/}

In other words, the FCC proposes that, once the short-form (pre-bid) applications are filed, the parties will be prohibited from entering into joint ventures or other agreements concerning their bid. However, until the short-form applications are filed, the parties cannot enter into settlement agreements. The listing of short-form applicants tells the parties with whom they must settle, i.e., it lists all the applicants for a specific license.^{21/} Thus, the FCC proposes to prohibit settlements by preventing the formation of post-filing joint ventures or similar arrangements.

The proposal is inconsistent with Section 309(j). Although unexplained, it appears to be motivated by revenue maximization, which is prohibited. It cannot be reconciled with Section 309(j)(6), as quoted above. Further, it represents poor public

^{19/} (...continued)
make mutually exclusivity only a prerequisite to holding an auction, and not the triggering event for a mandatory auction against the wishes of settling applicants.

^{20/} Description, ¶23.

^{21/} Description, ¶36 (emphasis added).

^{22/} See Description, ¶¶23-24.

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policy, in that potential licensees would be arbitrarily precluded from structuring rational and competitive business arrangements between themselves once the pre-bid documents had been filed.

Conclusion

Accordingly, AIDE respectfully requests that OMB (1) perform a thorough review of the FCC's request for approval of its auction rules, (2) require the FCC to permit Designated Entities to make only a nominal pre-auction qualifying payment, (3) require the FCC to permit Designated Entities make installment payments for all auctionable licenses, (4) require the FCC to eliminate its auction penalty and activity rules, and (5) require the FCC to accept settlements between potential bidders for all auctionable licenses.

Respectfully submitted,



William J. Franklin
Attorney for the
Association of Independent
Designated Entities

WJF/mcf

cc: Association of Independent Designated Entities
FCC Records Management Division
Ms. Sally Katsen (via hand)